Marina bte Mohd Yusoff v Pekeliling Triangle Sdn Bhd (receiver and manager appointed)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEALS NO W-02–944 OF 2006, W-02–945 OF 2006, W-02–1018 OF 2006, W-02–1070 OF 2006

MOHD GHAZALI, HASAN LAH AND SULAIMAN DAUD JJCA
22 OCTOBER 2007

Civil Procedure — Injunction — Interlocutory injunction — Interlocutory injunction to stop from interfering with the receiver and manager in managing and controlling the assets of company — Whether there were serious questions to be tried — Whether balance of convenience lay in favour of plaintiff

Civil Procedure — Injunction — Interlocutory injunction — Whether court precluded by express statutory provisions from granting any injunction or other restraining orders

Civil Procedure — Injunction — Principles to be applied in granting injunction — Whether there were serious questions to be tried — Whether the balance of convenience lay in favour of plaintiff — Whether plaintiff in a financial position to pay under the undertaking as to damages given by it

Pekeliling Triangle Sdn Bhd ('PTSB') is the registered owner of three pieces of land together with buildings erected thereon. Marina Yusoff ('MY') is the holder of 95% of the shares of PTSB. PTSB was granted credit facilities by Bank Bumiputra Malaysia Berhad ('BBMB'). PTSB defaulted in its loan repayments. By a vesting certificate issued under the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Act'), the loan and security documents relating to the credit facilities were vested to Danaharta Urus Sdn Bhd. Danaharta Urus appointed Lim Tian Huat, Chew Cheng Leong and Raja Ali Raja Othman as Special Administrators of PTSB under the provisions of the Act. Their appointment was subsequently terminated and on the same day Danaharta Urus appointed Duar Tuan Kiat as the receiver and manager of PTSB under the terms of a debenture earlier executed by PTSB in favour of BBMB. Despite the appointment of the receiver and manager, MY continued to occupy the properties. PTSB filed the action herein against MY claiming possession of the properties and seeking an injunction to restrain MY from interfering with the receiver and manager in managing and controlling the

assets of PTSB. MY counterclaimed seeking a declaration that the appointment of the receiver and manager was void and of no effect and consequential injunctive relief to restrain the receiver and manager from interfering with MY's right to enter and occupy the properties. The High Court granted an interlocutory injunction in the terms sought by PTSB ('the first order'). The High Court however refused to grant the interlocutory injunction sought by MY pursuant to the counterclaim ('the second order'). The High Court also granted an Erinford injunction pending an appeal by MY against the second order. Four appeals were filed to the Court of Appeal. The first appeal was filed by MY against the decision of the High Court in granting the first order. The second and fourth appeals were filed by MY against the second order and the refusal to grant a stay of execution of the first order respectively. The third appeal is by the receiver and manager against the grant of the Erinford injunction to MY pending disposal of the second appeal.

Held, dismissing the first, second and fourth appeals and allowing the third appeal:

(1) The remedy which PTSB seeks against MY includes delivery of possession of the said lands and building which in substance is a mandatory interlocutory injunction. Such injunctions are granted on the same basic principles as are prohibitory injunctions, namely there is a question to be tried and the balance of convenience. However in addition the plaintiff, in order to succeed, has to show that his case has a higher probability of success at the trial of the action (see para 10).

(2) There are serious questions to be tried, including the right of the receiver and manager to have the control and management over the said assets and the right to exercise the powers conferred upon them under the debenture. It is the only question that has to be answered at this stage. As has been stated time and again it is not part of the court's function at this stage of the proceedings either to form a view on the merits of the plaintiff's case or to decide on difficult questions of law which necessitate detailed deliberation and consideration (see para 13).

(3) MY claimed that she was authorized to occupy the said lands and building in order to keep the building in good repair and to complete its construction. It is also alleged that the appointment of the receiver and manager is void in law, and that the receiver and manager or his agents and servants are not entitled to enter the said lands and building. It is to be noted that these two factors also formed the basis of MY's cause of action in the counterclaim wherein she only prays for general damages in addition to the ancillary declaratory and injunctive reliefs. Having considered MY defence and cause of action in the counterclaim,

it is plain that damages would be an adequate remedy for MY if the interlocutory injunction is wrongly granted to PTSB (see para 14).

(4) At the same time PTSB is in a financial position to pay MY under the undertaking as to damages given by it. The said lands and building formed the assets of PTSB. The appointment of the receiver and manager will facilitate the sale of the assets which would maximize the returns to satisfy its creditors, including Danaharta Urus. These assets or the proceeds of sale thereof, as the case may be, will definitely provide the financial means for PTSB, through Danaharta Urus, to fulfill its undertaking as to damages to MY if the latter were to succeed at the trial in establishing her right to occupy or otherwise deal with the said lands and building (see para 15).

(5) In so far as the balance of convenience is concerned, the justice of the case also lies strongly in favour of PTSB. PTSB as the registered proprietor has priority of interest on the said lands over MY who is only a shareholder. The said lands however are not free from encumbrances but subject to a charge as a security for the facility agreement. With the acquisition of the facility agreement and other rights and interests relating thereto, Danaharta Urus had in fact purchased the rights and interests over the non-performing loan from BBMB. The sole purpose of the injunction sought by PTSB, through its receiver and manager, is for the preservation of the assets and to facilitate the sale thereof. The continued occupation of the said lands and building by MY will also prevent any prospective buyer from inspecting the said property with the resulting effect of hindering the sale. Any delay in realizing such assets will undoubtedly lead to further accumulation of the interests payable by PTSB for the remaining unpaid sum under the facility agreement. At the same time Danaharta Urus would be unable to recover the sum expended for the purchase of the non-performing loan which will ultimately affect its financial capabilities to meet the object of its incorporation under the Act (see para 16).

(6) On the other hand MY, as shareholder, has no legal right to any item of property owned by PTSB other than to a share in the profits while the company continue to carry out business. She has no power to deal with the said lands and building. MY is also fully aware of PTSB's default under the facility agreement and that the rights and interests of the lending bank have been vested to Danaharta Urus who appointed the receiver and manager (see para 17).

(7) The appointment of a special administrator under the Act, specifically under ss 23, 24 and 25A thereof, is only discretionary at the instance of the person specified therein. There is nothing in the Act to prevent the appointment of any person other than the special administrator to have the custody, control and management of the asset of any affected person

vested to the corporation or its subsidiary. In the instant case Danaharta Urus has acquired the rights and interests of the lending bank under the debenture which provide for the appointment of the receiver and manager on the occurrence of any event of default thereunder. The appointment of the receiver and manager was proper (see para 23).

(8) The court is precluded by the expressed provisions in the said s 72 from granting any injunction or other restraining orders against the corporation. The said prohibition also apply to a subsidiary of the corporation by virtue of s 60 of the Act (see para 26).

(9) Apart from the test whether there is a likelihood of a successful appeal being rendered nugatory, the principle governing the grant of an interlocutory injunction are equally applicable to the grant of an Erinford injunction. Any application for an Erinford injunction must involve considerations of the overall justice of the case and as to whether damages being an adequate remedy. The learned judge has rightly applied s 72 of the Act in refusing the interlocutory injunction sought by MY. The grant of the Erinford injunction by the learned judge would seem to run foul of the said s 72 as it has the like effect of restraining the action taken or proposed to be taken by Danaharta Urus or its servants or agents over the assets of PTSB (see para 32).

(10) In view of the earlier finding that damages would be adequate remedy and Danaharta Urus by whom the receiver and manager was appointed is in a financial position to pay them, there is no likelihood of MY's appeal being rendered nugatory if the Erinford injunction is refused (see para 33).

[Bahasa Malaysia summary

Pekeliling Triangle Sdn Bhd ('PTSB') adalah pemilik berdaftar tiga keping tanah bersama bangunan-bangunan yang dibina di atasnya. Marina Yusoff ('MY') adalah pemegang 95% saham PTSB. PTSB telah diberikan kemudahan kewangan oleh Bank Bumiputra Malaysia Berhad ('BBMB'). PTSB telah gagal membuat bayaran balik pinjamannya. Melalui satu sijil pemberian telah dikeluarkan di bawah Akta Pengurusan Danaharta Nasional Berhad 1998 ('Akta tersebut'), pinjaman dan dokumen-dokumen cagaran berkaitan kemudahan kewangan telah diberikan kepada Danaharta Urus Sdn Bhd. Danaharta Urus telah melantik Lim Tian Huat, Chew Cheng Leong dan Raja Ali Raja Othman sebagai Pentadbir-Pentadbir Khas PTSBdi bawah peruntukan Akta tersebut. Pelantikan mereka kemudiannya telah ditamatkan dan pada hari yang sama Danaharta Urus telah melantik Duar Tuan Kiat sebagai penerima dan pengurus PTSB di bawah terma-terma debentur yang disempurnakan sebelum ini oleh PTSB bagi pihak BBMB. Meskipun pelantikan penerima dan pengurus tersebut, MY masih menetap atas

hartanah tersebut. PTSB telah memfailkan tindakan ini terhadap MY menuntut milikan ke atas hartanah tersebut dan memohon satu injunksi untuk menghalang MY daripada campur tangan dengan penerima dan pengurus yang menguruskan dan mengawal aset-aset PTSB. MY telah menuntut balas dengan memohon deklarasi bahawa pelantikan penerima dan pengurus tersebut adalah terbatal dan tidak berkuat kuasa dan relif injunksi seterusnya untuk menghalang penerima dan pengurus daripada campur tangan dengan hak MY memasuki dan menetap hartanah tersebut. Mahkamah Tinggi telah memberikan injunksi interlokutori dalam terma yang dipohon oleh PTSB ('perintah pertama'). Mahkamah Tinggi bagaimanapun enggan memberikan injunksi interlokutori yang dipohon oleh MY berikutan tuntutan balas tersebut ('perintah kedua'). Mahkamah Tinggi juga memberikan injunksi Erinford sementara menunggu rayuan oleh MY terhadap perintah kedua. Empat rayuan telah difailkan ke Mahkamah Rayuan. Rayuan pertama telah difailkan oleh MY terhadap keputusan Mahkamah Tinggi dalam memberikan perintah pertama. Rayuan-rayuan kedua dan keempat telah difailkan oleh MY terhadap perintah kedua dan keengganan memberikan penggantungan pelaksanaan perintah pertama masing-masingnya. Rayuan ketiga adalah oleh penerima dan pengurus terhadap pemberian injunksi Erinford kepada MY sementara menunggu rayuan kedua selesai.

Diputuskan, menolak rayuan-rayuan pertama, kedua dan keempat dan membenarkan rayuan ketiga:

(1) Remedi yang dipohon PTSB terhadap MY termasuklah serahan milikan tanah-tanah dan bangunan tersebut yang pada amnya satu injunksi interlokutori mandatori. Injunksi sebegini dibenarkan atas dasar prinsip-prinsip am yang sama dengan injunksi larangan, khususnya jika ada persoalan yang perlu dibicarakan dan imbangan kesesuaian. Namun selain itu plaintif, bagi tujuan berjaya, hendaklah menunjukkan bahawa kesnya mempunyai kemungkinan kejayaan yang lebih tinggi untuk berjaya dalam perbicaraan tindakan tersebut (lihat perenggan 10).

(2) Terdapat persoalan serius yang perlu dibicarakan, termasuklah hak penerima dan pengurus untuk mempunyai kawalan dan pengurusan ke atas aset-aset tersebut dan hak untuk menggunakan kuasa-kuasa yang diberikan ke atas mereka di bawah debentur itu. Ianya satu-satunya soalan yang perlu dijawab di peringkat ini. Seperti yang telah dinyatakan berkali-kali ia bukan sebahagian daripada fungsi mahkamah di peringkat prosiding ini untuk membentuk pendapat

tentang merit kes plaintif atau memutuskan persoalan undang-undang yang sukar yang memerlukan perbincangan dan pertimbangan yang terperinci (lihat perenggan 13).

(3) MY mendakwa bahawa beliau diberi kuasa untuk menghuni tanah-tanah dan bangunan tersebut bagi tujuan mengekalkan bangunan tersebut dalam keadaan baik dan untuk menyiapkan pembinaan. Ia juga dikatakan bahawa pelantikan penerima dan pengurus adalah terbatal dari segi undang-undang, dan bahawa penerima dan pengurus atau ejen-ejen dan pekerja-pekerjanya tidak berhak memasuki tanah-tanah dan bangunan tersebut. Ia perlu ditekankan bahawa kedua-dua faktor tersebut juga membentuk asas kausa tindakan MY dalam tuntutan balas di mana beliau hanya memohon ganti rugi am selain daripada deklarasi sampingan dan relif-relif injunksi. Setelah mempertimbangkan pembelaan dan kausa tindakan MY dalam tuntutan balas tersebut, adalah jelas bahawa ganti rugi tersebut adalah remedi yang mencukupi untuk MY jika injunksi interlokutori telah salah diberikan kepada PTSB (lihat perenggan 14).

(4) Pada masa sama PTSB berada dalam kedudukan kewangan untuk membayar MY di bawah aku janji berhubung ganti rugi yang diberikan olehnya. Tanah-tanah dan bangunan tersebut membentuk aset-aset PTSB. Pelantikan penerima dan pengurus akan memudahkan jualan aset-aset yang akan memaksimumkan pulangan untuk memuaskan pemiutang-pemiutangnya, termasuklah Danaharta Urus. Aset-aset atau hasil kutipan jualan tersebut, mengikut kes, semestinya memberikan sumber kewangan untuk PTSB, melalui Danaharta Urus, untuk memenuhi aku janjinya berhubung ganti rugi kepada MY jika MY berjaya di perbicaraan dengan membuktikan haknya untuk menghuni atau sebaliknya menguruskan tanah-tanah dan bangunan tersebut (lihat perenggan 15).

(5) Setakat imbangan kesesuaian adalah berkaitan, keadilan kes juga terletak di pihak PTSB. PTSB sebagai tuanpunya berdaftar mempunyai keutamaan kepentingan ke atas tanah-tanah tersebut daripada MY yang hanya seorang pemegang saham. Tanah-tanah tersebut bagaimanapun tidak bebas daripada sekatan tetapi tertakluk kepada satu gadaian sebagai cagaran untuk perjanjian kemudahan tersebut. Dengan pemerolehan perjanjian kemudahan dan hak dan kepentingan lain yang berkaitan, Danaharta Urus sememangnya membeli hak dan kepentingan ke atas pinjaman yang tidak terlaksana daripada BBMB. Satu-satunya tujuan untuk injunksi yang dipohon oleh PTSB, melalui penerima dan pengurus, adalah untuk pemeliharaan aset-aset tersebut dan untuk memudahkan jualannya. Penghunian berterusan atas tanah-tanah dan bangunan tersebut oleh MY juga menghalang mana-mana bakal pembeli daripada memeriksa hartanah tersebut yang

A pasti menyebabkan jualan terhalang. Apa-apa kelewatan dalam merealisasikan aset-aset tersebut tanpa ragu akan menyebabkan pengumpulan faedah yang perlu dibayar oleh PTSB untuk jumlah yang masih belum berbayar di bawah perjanjian kemudahan tersebut. Pada masa sama Danaharta Urus tidak akan mendapat balik jumlah B yang telah digunakan untuk membeli pinjaman yang tidak terlaksana yang akhirnya akan menjejaskan kemampuan kewangan untuk mencapai objektif penubuhannya di bawah Akta tersebut (lihat perenggan 16).

C (6) Sebaliknya MY sebagai pemegang saham tiada hak sah terhadap mana-mana item hartanah yang dimiliki oleh PTSB selain daripada bahagian dalam keuntungan sementara syarikat masih terus menjalankan perniagaan. Beliau tiada kuasa untuk mengendalikan tanah-tanah dan bangunan tersebut. MY juga sedar tentang kegagalan D PTSB di bawah perjanjian kemudahan tersebut dan bahawa hak-hak dan kepentingan-kepentingan bank yang memberikan pinjaman telahpun diberikan kepada Danaharta Urus yang telah melantik penerima dan pengurus (lihat perenggan 17).

(7) Pelantikan pentadbir khas di bawah Akta tersebut khususnya di bawah E ss 23, 24 dan 25A hanyalah menurut budi bicara untuk mereka yang terangkum secara spesifik di bawah peruntukan-peruntukan tersebut. Tiada dalam Akta tersebut yang menghalang pelantikan sesiapa selain daripada pentadbir khas untuk mempunyai penjagaan, kawalan dan pengurusan aset mana-mana individu yang terjejas yang diberikan F kepada syarikat atau anak syarikatnya. Dalam kes ini Danaharta Urus telah memperoleh hak dan kepentingan bank yang memberikan pinjaman di bawah debentur yang memperuntukkan tentang pelantikan penerima dan pengurus sekiranya berlaku kegagalan sebegini. Pelantikan penerima dan pengurus tersebut adalah teratur G (lihat perenggan 23).

(8) Mahkamah adalah dihalang oleh peruntukan-peruntukan yang dinyatakan dalam s 72 daripada memberikan apa-apa injunksi atau perintah-perintah sekatan lain terhadap syarikat. Sekatan tersebut juga H terpakai terhadap anak syarikat kepada syarikat tersebut menurut s 60 Akta tersebut (lihat perenggan 26).

(9) Selain daripada ujian sama ada terdapat kemungkinan rayuan yang berjaya dianggap tidak berguna, prinsip yang mengawal pemberian suatu injunksi interlokutori sama pemakaiannya untuk memberikan I injunksi Erinford. Apa-apa permohonan untuk injunksi Erinford hendaklah melibatkan pertimbangan menyeluruh keadilan kes dan berhubung sama ada ganti rugi merupakan remedi yang mencukupi. Hakim yang bijaksana dengan betul telah menggunakan s 72 Akta tersebut dengan tidak memberikan injunksi interlokutori yang dipohon

oleh MY. Pemberian injunksi Erinford oleh hakim bijaksana kelihatan bercanggah dengan s 72 kerana ia mempunyai kesan yang sama seperti menghalang tindakan yang diambil atau yang dicadangkan untuk diambil oleh Danaharta Urus atau ejen-ejen atau pekerja-pekerjanya ke atas aset-aset PTSB (lihat perenggan 32).

(10)Berdasarkan penemuan awal bahawa ganti rugi merupakan remedi yang mencukupi dan Danaharta Urus yang mana penerima dan pengurus telah dilantik berada dalam kedudukan kewangan untuk membayar mereka, tidak terdapat kemungkinan yang rayuan MY dianggap tidak berguna jika injunksi Erinford ditolak (lihat perenggan 33).]

Notes

For a case on principles to be applied in granting injunction, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 3543.

For cases on interlocutory injunction, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3224–3348.

Cases referred to

American Cyanamid Co v Ethicon Ltd [1975] AC 396 (refd)

Erinford Properties Ltd v Cheshire County Counsel [1974] 2 All ER 448 (refd)

Foss v Harbottle (1843) 67 ER 189 (refd)

Kekatong Sdn Bhd v Bumiputra-Commerce Bank Bhd & Anor [2002] 6 MLJ 186 (refd)

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004]1 MLJ 257 (refd)

Locabail International Finance Ltd v Agroexport [1986] 1 All ER 901 (refd)

MBf Holdings Bhd v East Asiatic Co (Malaysia) Bhd [1995] 3 MLJ 49 (refd)

Pengurusan Danaharta Nasional Bhd v Tang Kwor Ham & Ors and another appeal [2007] 5 MLJ 125 (refd)

Tan Sri Dato' Tajuddin Ramli v Pengurusan Danaharta Nasional Bhd & Ors [2002] 5 MLJ 720 (refd)

Timbermaster Timber Complex (Sabah) Sdn Bhd v Top Origin Sdn Bhd [2002] 1 MLJ 33 (refd)

Legislation referred to

Companies Act 1965 s 186(1)

Pengurusan Danaharta Nasional Berhad Act 1998 ss 23, 24, 25A, 60, 72

Appeal from: Suit No S5–22–353 of 2006 (High Court, Kuala Lumpur)

Zainur Zakaria (David Mathews with him) (Zainur Zakaria & Co) for the appellant in the first, second and fourth appeals and respondent in the third appeal.

Yoong Sin Min (Lau Kee Sern with her) (Shook Lin & Bok) for the appellant in the first appeal; the appellant in the third appeal and respondent in the fourth appeal.

Cindy Goh Joo Seong (Cheang & Ariff) for the second respondent in the second appeal.

Ezane Chong (Skrine) for the third, fourth and fifth respondents in the second appeal.

Sulaiman Daud JCA (delivering judgment of the court):

[1] There were four related appeals before us as follows:

(a) the first appeal (No W-02–944 of 2006) is by Marina bte Mohd Yusoff ('MY'), the defendant in the main action and plaintiff in the counterclaim, against the decision of the learned judge whereby he granted Pekeliling Triangle Sdn Bhd ('PTSB'), the plaintiff in the main action, interlocutory injunctions restraining MY from occupying certain lands and building belonging to PTSB, and from interfering with the appointed receiver and manager's control and management over the assets of PTSB ('the first order');

(b) the second appeal (No W-02–945 of 2006) and the fourth appeal (No W-02–1070 of 2006) are also MY's appeal against the refusal to grant the interlocutory injunction sought against the first and the fifth to the eight defendants in the counterclaim ('the second order'); and the refusal to grant stay of execution of the first order respectively.

(c) The third appeal (No W-02–1018 of 2006) is by the first defendant in the counterclaim against the grant of the Erinford injunction to MY pending the disposal of her appeal against the second order.

[2] After hearing submissions of counsels from both parties, we dismissed the first, second and fourth appeals, but allowed the third appeal. We now give our reasons for the decision.

BACKGROUND

[3] PTSB is at all material times the registered owner of three pieces of land respectively held under CT 16910 Lot No 151, C.T. 16911 Lot 152 and CT 16916 Lot No 157, all of section 87A, Town of Kuala Lumpur ('the said lands') together with the building erected thereon ('the said building'). MY is the holder of 95% shares of PTSB. Pursuant to a facility agreement dated 15 March 1995 PTBS was granted credit facilities of RM169,800,000 by Bank Bumiputra Malaysia Berhad ('BBMB'), the payment of which was secured by, among others: (i) a debenture dated 15 March 1995 entered

between PTSB and BBMB ('the debenture'); (ii) a first legal charge over the said lands executed by PTSB in favour of BBMB; and (iii) a tripartite agreement dated 15.3.1995 ('the tripartite agreement') entered between PTSB, BBMB and one ERF Sdn Bhd.

[4] PTSB defaulted in its loan repayments. By a vesting certificate dated 26 April 2001 issued under the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Act'), the loan and security documents related to the facility agreement were vested as of 1 March 2002 to Danaharta Urus Sdn Bhd ('Danaharta Urus'), a subsidiary of Pengurusan Danaharta Nasional Berhad ('the Corporation'). In October and December 2002, Danaharta Urus appointed one Lim Tian Huat, Chew Cheng Leong and Raja Ali bin Raja Othman, the second, third and fourth defendants in the counterclaim respectively, to be the Special Administrators of PTSB under the Act. Their appointment were subsequently terminated with effect from 9 December 2005. On the same day Danaharta Urus appointed one Duar Tuan Kiat, the first defendant in the counterclaim, as the receiver and manager of PTSB under the terms of the debenture. Clause 8(2)(i) of the debenture conferred the receiver and manager the power to take possession of and get in all or any of the assets of PTSB for the purposes specified therein.

[5] Despite the appointment of the receiver and manager, MY continue to occupy the said lands and building. Subsequently by a letter dated 1 March 2006, PTSB through its solicitors, demanded MY to vacate the said lands and building but there was no response. On 21 April 2006 PTSB filed the main suit herein against MY claiming possession of the said lands and building, and seeking injunctions to restrain MY from interfering with the receiver and manager in managing and controlling PTSB's asset.

[6] MY in her defence averred that PTSB has entered into a sale and purchase agreement with one Marina Sdn Bhd ("MSB") thereby making the latter the beneficial owner of the lands and building. She also denied that PTSB had defaulted in the payment of the loan for the same to be categorized as a non-performing loan. MY also alleged that the appointment of the receiver and manager of PTSB is void in law and that PTSB or its servants, agents or nominees are not entitled to enter the said lands and building. MY also incorporated in her defence a counterclaim whereby she seeks a declaration that the appointment of the said receiver and manager was void and of no effect and the consequential injunctive reliefs to restrain the receiver and manager from interfering with MY's right to enter and occupy the said lands and building.

A [7] Pursuant to the main suit PTSB had applied for and obtained the interlocutory injunction to which the first appeal relates. The learned high court judge however refused to grant the interlocutory injunction sought by MY pursuant to the counterclaim.

B [8] We have dealt with and considered both the first and second appeals together as they are based on the same factual matrix and substantially identical issues. Encik Zainur Zakaria, for the appellant, advanced two principal issues for both the first and second appeals. First he submitted that the appointment of the receiver and manager is invalid in the absence of any C proper instrument of appointment, and secondly it is submitted that the interlocutory injunction applied for amounts to final relief sought under the writ and should not be allowed.

D INTERLOCUTORY INJUNCTION PRINCIPLE, IN BRIEF

[9] Learned counsel for both parties have correctly set out the correct approach to be adopted by the court in an application for an interlocutory injunction. The threshold test to be applied in such an application was E established in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. The court must first be satisfied that a claim is not frivolous or vexatious in that there is a serious question to be tried. If such exists, the court should next consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by F award of damages if the interlocutory injunction is refused. If answered in the negative, the court should then consider whether the defendant can be adequately compensated by award of damages if the interlocutory injunction was wrongly granted. If there was a doubt as to the adequacy of damages as a remedy, then the question of balance of convenience has to be considered.

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[10] In the instant case the remedy which PTSB seeks against MY includes delivery of possession of the said lands and building which in substance is a mandatory interlocutory injunction. Such injunctions are granted on the same basic principles as are prohibitory injunctions, namely there is a H question to be tried and the balance of convenience. However in addition the plaintiff, in order to succeed, has to show that his case has a higher probability of success at the trial of the action. This test was adopted in *Timbermaster Timber Complex (Sabah) Sdn Bhd v Top Origin Sdn Bhd* [2002] 1 MLJ 33 following the English Court of Appeal case of *Locabail International Finance* I *Ltd v Agroexport* [1986] 1 All ER 901 (see also *MBf Holdings Bhd v East Asiatic Co (Malaysia) Bhd* [1995] 3 MLJ 49). The rationale given for this different approach is that in the case of a mandatory interlocutory injunction the plaintiff will in substance obtain the reliefs that he seeks in the main action.

[11] With these guiding principles we now turn to consider the present appeals. A

W-02–944 of 2006

[12] With regard to the first appeal, the first factor on whether there is a serious question to be tried can be answered without any difficulty. The present suit by PTSB against MY are for trespassing and interfering with the right and control over its own property. It is pertinent to note the action was initiated by the receiver and manager appointed by Danaharta Urus pursuant the terms of a debenture upon PTSB's default under the facility agreement secured, inter alia, by the debenture. Danaharta Urus has acquired the rights, titles and interests in the facility agreement and the debenture by virtue of a vesting order under section 14 of the Act. In the appeal MY admitted being in occupation of the said lands and building but however disputed the validity of the appointment of the receiver and manager to have the control and management thereof. B C D

[13] Having considered PTSB's cause of action against MY and the reliefs sought by PTSB against MY in the main action, we are more than satisfied that there are serious questions to be tried, including the right of the receiver and manager to have the control and management over the said assets and the right to exercise the powers conferred upon them under the debenture. It is the only question that has to be answered at this stage. As has been stated time and again it is not part of the court's function at this stage of the proceedings either to form a view on the merits of the plaintiff's case or to decide on difficult questions of law which necessitate detailed deliberation and consideration. E F

[14] Having found that there is a serious question to be tried, the court must next consider the balance of convenience or the justice of the case, including whether MY can be adequately compensated by damages if the interlocutory injunction was wrongly granted to PTSB. It is not disputed that the said lands and building are subject to a charge in favour of Danaharta Urus which has purchased the non-performing loan. MY did not deny that her agents and servants are in continuous occupation of the said lands and building. In her Affidavit in Reply (No 1) she claimed that she was authorized to occupy the said lands and building in order to keep the building in good repair and to complete its construction. It is also alleged that the appointment of the receiver and manager is void in law, and that the receiver and manager or his agents and servants are not entitled to enter the said lands and building. It is to be noted that these two factors also formed the basis of MY's cause of action in the counterclaim wherein she only prays for general damages in addition to the ancillary declaratory and injunctive reliefs. Having considered G H I

A MY defence and cause of action in the counterclaim, it is plain to us that damages would be an adequate remedy for MY if the interlocutory injunction is wrongly granted to PTSB.

B **[15]** At the same time we are also of the view that PTSB is in a financial position to pay MY under the undertaking as to damages given by it. The said lands and building formed the assets of PTSB. The appointment of the receiver and manager will facilitate the sale of the assets which would maximize the returns to satisfy its creditors, including Danaharta Urus. These assets or the proceeds of sale thereof, as the case may be, will definitely C provide the financial means for PTSB, through Danaharta Urus, to fulfill its undertaking as to damages to MY if the latter were to succeed at the trial in establishing her right to occupy or otherwise deal with the said lands and building.

D **[16]** In so far as the balance of convenience is concerned, we are also of the view that the justice of the case lies strongly in favour of PTSB. PTSB as the registered proprietor has priority of interest on the said lands over MY who is only a shareholder. The said lands however is not free from encumbrances E but subject to a charge as a security for the facility agreement. With the acquisition of the facility agreement and other rights and interests relating thereto, Danaharta Urus had in fact purchased the rights and interests over the non-performing loan from BBMB. The sole purpose of the injunction sought by PTSB, through its receiver and manager, is for the preservation of F the assets and to facilitate the sale thereof. The continued occupation of the said lands and building by MY will also prevent any prospective buyer from inspecting the said property with the resulting effect of hindering the sale. Any delay in realizing such assets will undoubtedly lead to further accumulation of the interests payable by PTSB for the remaining unpaid sum G under the facility agreement. At the same time Danaharta Urus would be unable to recover the sum expended for the purchase of the non-performing loan which will ultimately affect its financial capabilities to meet the object of its incorporation under the Act.

H **[17]** On the other hand MY, as shareholder, has no legal right to any item of property owned by PTSB other than to a share in the profits while the company continue to carry out business. She has no power to deal with the said lands and building. MY is also fully aware of PTSB's default under the facility agreement and that the rights and interests of the lending bank have I been vested to Danaharta Urus who appointed the receiver and manager.

[18] With regard to the effect of the interlocutory injunction, even though we agree that the plaintiff will, with the grant thereof, substantially obtain the reliefs sought under the writ but we are satisfied for the reasons aforesaid that

PTSB has shown that they have an unusually clear case and a real prospect of success at the trial to justify the grant of the interlocutory injunctions.

[19] For the above reasons, we unanimously dismissed the first appeal with costs. We also made an order for the deposit to be paid to the respondent towards the account of taxed costs.

W-02–945 of 2006

[20] We next turn to the second appeal against the decision of the learned judge whereby he refused to grant the interlocutory injunctions sought by MY, as plaintiff in the counterclaim, against the first and the fifth to the eight defendants therein to restrain them from obstructing or interfering with her alleged right to enter, remain or otherwise occupy the said lands and building. Central to MY's case as argued by learned counsel is that the receiver and manager was not validly appointed to exercise the power under the said debenture.

[21] With regard to this issue, En Zainur Zakaria, for the appellant, pointed out exhibits PTSB-5 (at pp 665–666 of the appeal record) is not the proper instrument of appointment of the receiver and manager but merely a notification of such appointment that has to be lodged with the Registrar of Companies under s 186(1) of the Companies Act 1965. Further it is also submitted that the said appointment could not have been made under the Act by the Special Administrators of PTSB as their appointment have been earlier terminated prior to the appointment of the receiver and manager. According to learned counsel under the Act only the Special Administrator is empowered to appoint a receiver and manager in respect of any assets vested to the Corporation.

[22] Mss Yoong Sin Min, for the first respondent, on the other hand clarified that the appointment of the receiver and manager was not made under the Act but pursuant to the terms of the debenture upon PTSB's default under the facility agreement to which the debenture relates. She drew the court's attention to PTSB-20 (at p 739 of the appeal record) which exhibited the deed of appointment of the receiver and manager by Danaharta Urus.

[23] Having perused through the said deed we have no hesitation to accept the same as the valid instrument of appointment of the receiver and manager pursuant to the terms of the debenture. We are of the view that the appointment of a Special Administrator under the Act, specifically under ss 23, 24 and 25A thereof, is only discretionary at the instance of the person specified therein. There is nothing in the Act to prevent the appointment of

any person other than the Special Administrator to have the custody, control and management of the asset of any affected person vested to the Corporation or its subsidiary. In the instant case Danaharta Urus has acquired the rights and interests of the lending bank under the debenture which provide for the appointment of the receiver and manager on the occurrence of any event of default thereunder. For these reasons we are of the view that the appointment of the receiver and manager was proper.

[24] Next we turn to consider the appeal against the second to the fifth respondents, being the fifth to the eight defendants in the counterclaim respectively. With regard to the second respondent, its learned counsel Ms Cindy Goh submitted that MY grounds of appeal as set out in the memorandum of appeal herein do not relate to the second defendant and therefore irrelevant for consideration against her client. We fully agree with her. Having perused through the grounds as set out in the memorandum of appeal we see nothing therein that relate or make reference to the second respondent. As can be seen the grounds advanced in paras 1 to 4 of the memorandum only relate to the appointment of the first respondent as the receiver and manager of PTSB which has been dealt with aforesaid. The ground stated in para 5 is general in nature without specifying the points of law or fact which has been wrongly decided concerning the said respondent. We dismissed the appeal against the second respondent on this ground alone.

[25] In the case of the third to the fifth respondents, learned counsel Ms Ezane Chong submitted that the issues forming the basis of MY's appeal only relate to the alleged acts or omissions of Danaharta Urus. She pointed out that the fourth respondent Prokhas Sdn Bhd is merely a company assigned with the management of Danaharta Urus, while the third and the fifth respondents were no longer in the employment of Danaharta Urus to have any capacity or right to restrain the receiver and manager in the manner sought in the interlocutory injunction. In any event it is further submitted that if the interlocutory injunctions are sought against the third to the fifth respondents in their capacity as agents of Danaharta Urus then s 72 of the Act shall operate to bar the grant of the said injunctive relief. To recapitulate it is on this ground that the learned judge dismissed MY's application where, in his brief ruling, he said:

> The defendant by encl 13 is in effect attempting to obtain indirectly an injunction against Danaharta. By stopping the Receiver and Manager from obtaining possession of the said building the defendant would have restrained Danaharta from its right to realize the charge over the land and building. Under s 72 of the Pengurusan Danaharta Nasional Berhad Act 1998 (Act 587) no injunctions order can be made against Danaharta or to affect its action. ……

[26] We fully agree with the learned judge. In *Pengurusan Danaharta Nasional Bhd v Tang Kwor Ham & Ors and another appeal* [2007] 5 MLJ 125, the Federal Court adopted with approval the decision in *Tan Sri Dato' Tajuddin Ramli v Pengurusan Danaharta Nasional Bhd & Ors* [2002] 5 MLJ 720 and *Kekatong Sdn Bhd v Bumiputra-Commerce Bank Bhd & Anor* [2002] 6 MLJ 186, which held that the court is precluded by the expressed provisions in the said s 72 from granting any injunction or other restraining orders against the Corporation. Here we would add that the said prohibition also apply to a subsidiary of the Corporation by virtue of s 60 of the Act.

[27] In addition, the respondents also raised the issue of locus standi. Learned counsel pointed out the counterclaim revolves solely around the affairs of PTSB and that the alleged losses also relate to PTSB and not MY personally. By reason thereof it is submitted that MY has no locus standi to claim for PTSB in her own name. The normal rule is that no shareholder has any right to any property owned by a company. The rule in *Foss v Harbottle* (1843) 67 ER 189, is that the proper plaintiff in an action in respect of a wrong alleged to be done to a company is the company itself. However this rule is subject to several exceptions as laid down by case laws. However it is not incumbent on our part in an appeal of this nature to form any view on the issue of locus standi as it calls for detailed argument on the question of facts and law.

[28] Further, we would reiterate that we have in the first appeal held that the balance of convenience lies in favour of granting the injunctive reliefs sought by PTSB. In consequence thereof the second appeal was also dismissed on this additional ground.

[29] We unanimously dismissed the second appeal with costs. The deposit to be paid to the respondent towards the account of taxed costs.

W-02–1018 of 2006 and W-02–1070 of 2006

[30] MY filed a notice of appeal against the decision of the learned judge in respect of the first and second orders, and applied by way of summons in chambers firstly, for stay of execution of the first order and secondly for an Erinford injunction pending her appeal against the refusal to grant the interlocutory injunction to which the second order relates. The learned judge dismissed MY's application for stay but allowed her application for the Erinford injunction. The third appeal, ie, W-02–1018 of 2006 is by the appointed receiver and manager Duan Tuan Kiat, the first defendant in the counterclaim, against the grant of the Erinford injunction, and the fourth appeal, ie, in W-02–1070 of 2006 is by MY against the refusal to grant stay.

[31] We will first consider the third appeal. It is well settled that the court has jurisdiction on dismissal of an application for an interlocutory injunction to grant the unsuccessful applicant an injunction pending an appeal against the dismissal. The principle governing the grant of the said injunction, known as an Erinford injunction, was set out by Meggary J, in *Erinford Properties Ltd v Cheshire County Counsel* [1974] 2 All ER 448, at p 454, as follows:

> There will, of course, be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on. But subject to that, the principle is to be found in the leading judgment of Cotton LJ in *Wilson v Church (No 2)* (1879–1980) 12 Ch D 454, where speaking of an appeal from the Court of Appeal to the House of Lords, he said at p 458, … when a party is appealing, exercising his undoubted right of appeal, this court ought to see the that the appeal, if successful, is not nugatory.' That was the principle which Pennycuick J applied in the *Onion* case [1962] 1 WLR 1085 and although the case had not been cited to me, it was on that principle, and not because I felt any doubts about my judgment on the motion, that I granted Mr Newsom the limited injunction pending appeal that he sought. This is not a case which damages seem to me to be a suitable alternative.

[32] Apart from the test whether there is a likelihood of a successful appeal being rendered nugatory, in our view the principle governing the grant of an interlocutory injunction are equally applicable to the grant of an Erinford injunction. Any application for an Erinford injunction must involve considerations of the overall justice of the case and as to whether damages being an adequate remedy. We have earlier held that the learned judge has rightly applied s 72 of the Act in refusing the interlocutory injunction sought by MY. In our view the grant of the Erinford injunction by the learned judge would seem to run foul of the said s 72 as it has the like effect of restraining the action taken or proposed to be taken by Danaharta Urus or its servants or agents over the assets of PTSB.

[33] Further MY's claims against the first respondent is substantially for damages based on the alleged wrongful appointment of the first respondent as the receiver and manager of PTSB. In view of our earlier finding that damages would be adequate remedy and Danaharta Urus by whom the receiver and manager was appointed is in a financial position to pay them, we find no likelihood of MY's appeal being rendered nugatory if the Erinford injunction is refused. The first respondent as the receiver and manager should be given immediate benefit of the earlier interlocutory injunction obtained by PTSB against MY. It also clear from the evidence that MY has declined to give possession of the lands and building for the time being occupied by her and her agents. We see no justification to restrain the duly appointed receiver

and manager to take over the possession, management and control of the said assets. Any further delay in realizing the assets will only cause hardship to Danaharta Urus in its endeavour to recover the money expended in purchasing the said non-performing loan from BBMB.

[34] We therefore unanimously allowed the third appeal with costs. The order of the learned judge as per paragraph (b) thereof is set aside and the deposit to be refunded to the appellant Duar Tuan Kiat.

W-02–1070 of 2006

[35] This is MY's appeal from the decision of the learned judge refusing a stay of execution of the first order. The basic principle for the grant of stay is well settled. In *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004]1 MLJ 257 it was held that to enable the court to grant stay of execution the applicant has to establish the existence of special circumstances.

[36] In the present appeal it appears to us from the affidavit in support that the application for stay is on the basis that failure to stay the execution of the interlocutory injunction would render the first appeal nugatory. However this point was not taken up by learned counsel in his submission. Be that as it may, we have earlier decided, in setting aside the Erinford injunction, that any loss suffered by MY, in the alleged wrongful appointment of the receiver and manager can be quantified, and the first respondent, being the receiver and manager appointed by Danaharta Urus, would be in a financial position to pay her. We therefore see no reason why this appeal would if successful be rendered nugatory.

[37] For the reasons aforesaid we unanimously dismissed this fourth appeal with costs and make further order for the deposit to be paid to the respondent towards the account of taxed costs.

First, second and fourth appeals dismissed. Third appeal allowed.

Reported by Brendan Navin Siva